86-1032

No. _____

Supreme Court, U.S.
FILED
AUG 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1986

Arlington Hotel Company, Inc...Petitioner

v.

National Labor Relations
Board.....Respondent

and

Southern Missouri-Arkansas District
Council, International Ladies' Garment
Workers' Union, AFL-CIO.....Intervenor

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF SOUTHERN MISSOURI-ARKANSAS DISTRICT COUNCIL, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

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August 1, 1986

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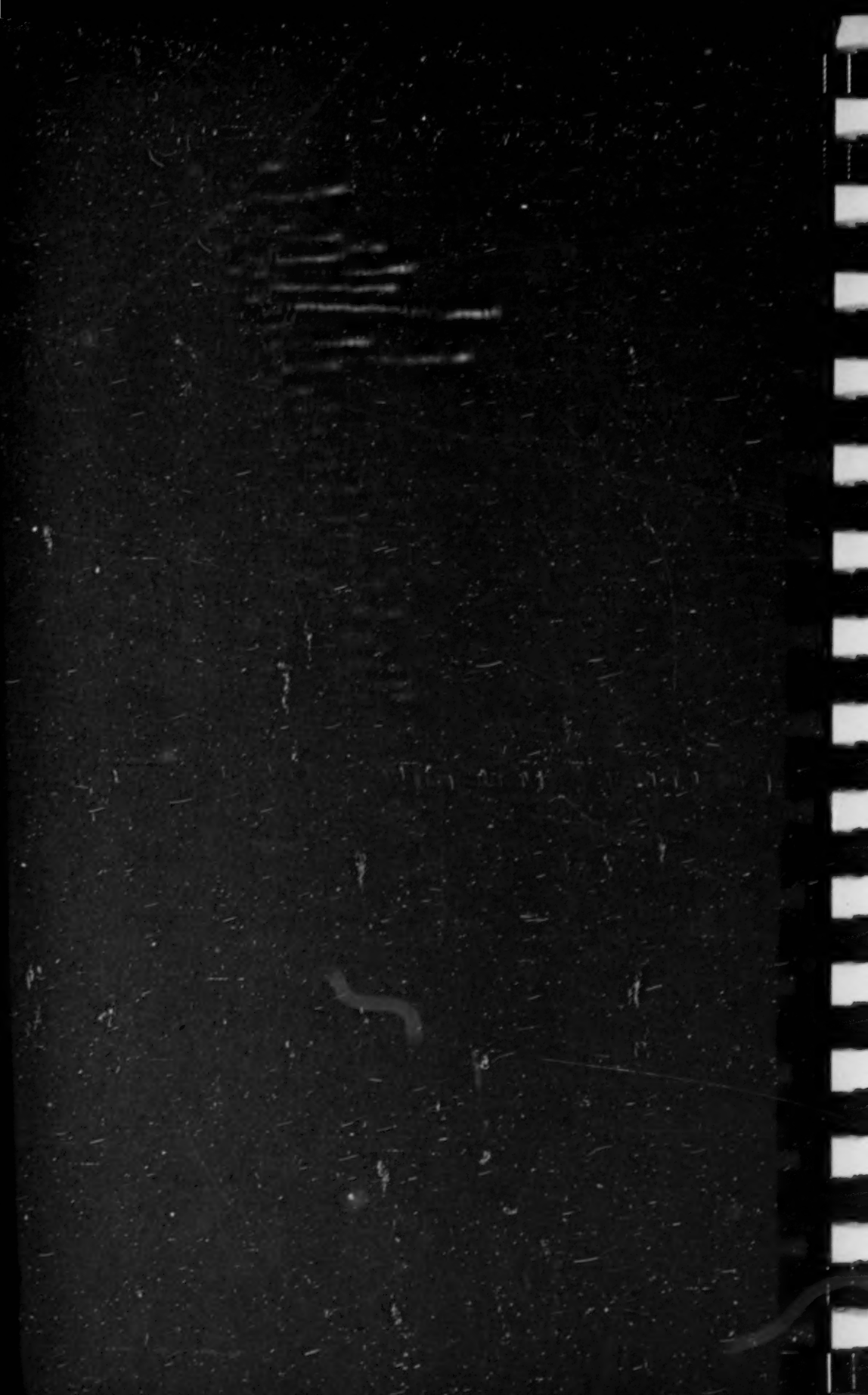

QUESTION PRESENTED

1. Can an employer refuse to consider returning economic strikers for job openings for which they are qualified, solely because of their exercise of statutory rights?

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STATEMENT OF THE CASE

This case involves the rights of employees of the Arlington Hotel who went on strike on March 13, 1981. Three days after the strike began the strikers unconditionally offered to return to work. The request to return, made by telegram and by personal presentation of letters, stated:

> I hereby apply unconditionally for my old job back or, if my old job is not available, my maximum employment rights under the law. Please consider this a continuing application for employment.

In response the hotel set up a recall "system" under which returning strikers were considered for reemployment only to the exact job and shift at which they were employed at the time of the strike.

Under this system, even though the hotel stipulated at hearing before the Administrative Law Judge of the National Labor Relations Board (hereinafter NLRB) that strikers were qualified for most openings, it hired over 200 new workers between the time of the strike and the hearing and refused to consider strikers for these positions. To this date, over five years since the end of the strike, through application of this recall "system", the hotel has not recalled all strikers.

REASONS FOR DENYING THE WRIT

This case is unworthy of review by this Court. The decisions of the NLRB law judge, the NLRB itself (Members Dotson, Hunter and Zimmerman), and the

Court of Appeals for the Eighth Circuit have been consistent. The recall policy of the hotel impermissibly discriminated against returning strikers in favor of new job applicants and employees who did not strike.

The petitioner's justification for seeking the writ is that its obligation to returning strikers consists solely of offering them the exact same position which they held when the strike began. The petitioner argues that when it has other openings for which returning strikers are qualified, it can discriminate against them in favor of new applicants simply because the returning strikers exercised their right under the National Labor Relations Act to strike.

Petitioner fundamentally misunderstands the line of cases upon which it

attempts to rely. These cases hold that returning strikers are entitled to receive their "former or substantially equivalent job" when it becomes open. (Brief of Petitioner at 6-7). See, e.g., Stewart Oil Co., 100 NLRB 4, enf'd, 207 F.2d 8 (5th Cir. 1953). They involved employers who refused to place returning strikers into their old jobs, but instead put them in jobs which were less desirable than the former jobs, arguing that this was all that was required to extinguish their obligations under the National Labor Relations Act. 29 U.S.C. § 151 et seq. The courts in these cases held that the refusals to place returning strikers into their former or substantially equivalent jobs were illegal. Nothing in those decisions supports petitioner's assertional leap that it can

lawfully refuse to consider qualified returning strikers for jobs other than their previous ones.

In support of its request for a writ of certiorari, petitioner further claims that the decisions of the Circuit Court and the NLRB create "chaos in what was a relatively settled area of law." (Petition at 14). This assertion is ludicrous. The decision of the NLRB follows past decisions. In Reid J. Cavanaugh, 255 N.L.R.B. 194 (1981), the NLRB stated:

> Board decisions make it clear that an employer's obligation to offer available positions to strikers also extends to positions which are not the same as the former position. Thus, in Bromine Division, Drug Research, Inc., 233 N.L.R.B. 253 at 261 (1977), it was found that a striker whose former job was in shipping and receiving, should have been offered a production work job for which he was qualified. In Crossroads Chevrolet, Inc., 233 N.L.R.B.

> 728, 730 (1977), it was concluded that the striker, rather than a new hire, should have been offered an available part-time position, even though the striker's former position was full-time. Thus, as pointed out, strikers are entitled to be offered jobs for which they are qualified even if it is a different job or in some respect a less desirable job. Accordingly, respondent's arguments that it did not need to offer Showman the job because it was not the same as his former job, or because it was anticipated that Showman would find the bonemeal and overnight work undesirable, must be rejected at the outset. At the very least, Showman was entitled to be put to a true test of deciding whether to accept reinstatement or not.

255 N.L.R.B. 194, 198, n. 9. (Emphasis supplied.)

This Court also has been clear on this issue. In NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967), the Court analyzed an employer's refusal to return economic strikers as violative of

the rights guaranteed in Section 7 of the National Labor Relations Act. 29 U.S.C. § 157. The Court expressly stated: "If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement." Id. at 619.

CONCLUSION

The decisions below expressly follow precedent of this court and the NLRB. The employer's discrimination was illegal. The writ should be denied.

Respectfully submitted,

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